MOHAMED SALLEH v. PUBLIC PROSECUTOR

[F.C. (Wee Chong Jin C.J., Tan Ah Tah F.J. and Choor Singh J.) November 14, 1968]

[Singapore — Federal Court Criminal Appeal No. Y3 of 1968]

Criminal Law and Procedure — Trial before High Court — Statement from the dock — Right of accused to make, if he wishes to do so — Comment of trial judge on probative value of unsworn statement — Criminal Procedure Code (Cap. 132).

Penal Code, ss. 300 and 302 — Murder — Summing up — Provocation — Burden of proof on accused — Evidence Ordinance, (Cap. 4), s. 106.

This was an appeal against the conviction of the appellant for murder. At the trial and at the close of the prosecution case the appellant was given the usual warning — "You may give evidence on oath in which case you have to do so from the witness box where you may be cross-examined like any other witness, or you may make a statement from the dock to the jury in which case you cannot be cross-examined by anyone, or you may remain silent". The appellant elected to make a statement from the dock. One of the points raised on appeal was that as there was no provision in the Criminal Procedure Code for an accused to make an unsworn statement from the dock, it was an irregularity, which could be cured only by a retrial, for the trial judge to tell the appellant that he had the choice of whether to give evidence on oath from the witness box or to make an unsworn statement from the dock. It was also alleged that this was prejudicial to the appellant as, having offered the appellant the right to make the unsworn statement from the dock the trial judge in his summing up told the jury that the unsworn statement was practically worthless as it was not on oath and as the appellant could not be cross-examined on it.

Submissions were also made that the direction in this case was defective and in particular that the learned trial judge had failed to give an adequate direction on the quantum of grave and sudden provocation which was raised by the appellant in his statement from the dock. It was alleged that the trial judge had expressed his own views on whether there was provocation and that he had misdirected the jury on the question of proof required of an accused person.

Held, dismissing the appeal: (1) the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code;

(2) it is proper for a judge in his summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross-examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case; and in this case the direction of the trial judge on this point was perfectly proper and in no way prejudicial to the appellant;

(3) a judge is entitled to express his own views provided the jury are told at the same time that they are not bound by those views and are told they are not relieved thereby of arriving at their own conclusions and in this case the summing up was not defective on this point as the judge repeatedly emphasised to the jury that they were not bound to accept his opinion or view on any issue of fact and that it was for them to decide;

(4) the learned trial judge did not misdirect the jury on the quantum of proof as the language used in the direction sufficiently conveyed to the jury that if they were left in genuine doubt as to the existence or non-existence of all the factors relating to the issue of grave and sudden provocation, they must find a verdict of guilty of culpable homicide not amounting to murder;

(5) even assuming there was a misdirection, a reasonable jury properly directed on this point, would be left in no genuine doubt that the provocative conduct and acts of the deceased as related by the appellant in his statement from the dock could not amount to provocation under exception 1 of section 300 of the Penal Code.

Case referred to:—

(1) *Soh Cheow Hor* v. *R.* [1960] M.L.J. 254.

FEDERAL COURT.

Dato' David Marshall for the appellant.

Tay Soo Tee (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J.: The appellant was charged in the High Court of Singapore before a jury on a charge of murder, the charge being as follows:—

"THAT YOU, Mohamed Salleh bin Daim, on or about the 15th day of August 1967 at about 7.25 p.m. at the Bukit Timah Fire Station, Upper Bukit Timah Road, 8 m.s. Singapore, committed murder by causing the death of one Rahmat bin Mohamed, and you have thereby committed an offence punishable under section 302 of the Penal Code (Chapter 119)."

At the close of the case for the prosecution the trial judge through an official interpreter of the court called on the appellant for his defence, gave the appellant the usual warning and informed the appellant that he could consult his counsel if he so wished.

The usual warning is ordinarily in the following terms: "You may give evidence on oath in which case you have to do so from the witness box where you may be cross-examined like any other witness, or you may make a statement from the dock to the jury in which case you cannot be cross-examined by anyone, or you may remain silent", and it is common ground that a "warning" to this effect was given to the appellant.

It appears to be not in dispute that the appellant consulted his counsel and then elected to make a statement from the dock.

After the appellant made his unsworn statement from the dock, no other witness was called for the defence. The trial judge then summed up to the jury and after a short retirement to consider their verdict they returned a unanimous verdict of guilty of murder as charged. The appellant now appeals against his conviction.

The first point raised by the appellant is that in the Chapter of the Criminal Procedure Code which deals with trials before the High Court, as there is no provision for an accused to make an unsworn statement from the dock, it was an irregularity, which could be cured only by a re-trial, for the trial judge to tell the appel-

lant he had a choice of whether to give evidence on oath from the witness box or to make an unsworn statement from the dock. It is submitted that this irregularity had misled the appellant to his prejudice and deprived him of a fair trial because, if the choice of making an unsworn statement from the dock had not been offered to him, he would undoubtedly have given evidence on oath. Another submission is that it was also prejudicial because, having offered the appellant the right to make an unsworn statement from the dock, the trial judge in his summing up told the jury that the unsworn statement was practically worthless as it was not on oath and as the appellant could not be cross-examined on it.

In our judgment, the right of an accused at his trial on a criminal charge to make an unsworn statement from the dock is not a procedural right but a substantive right of an accused and accordingly does not depend on whether or not there is a specific provision for it in the Criminal Procedure Code. It seems to us beyond doubt that under our system of administration of justice, and it has been so throughout the entire history of our courts, a person accused of a criminal offence before an established court of justice has at his trial, as part of his defence, the right to make an unsworn statement from the dock if he wishes to do so. In our view this right can be taken away only by an express statutory provision to that effect.

With regard to the question of prejudice arising out of the trial judge's comment on the probative value of the unsworn statement of the appellant, we are of the opinion that it is proper for a judge in summing up to remind the jury that a statement from the dock is not sworn evidence which can be the subject of cross-examination; that they can attach to it such weight as they think fit and that they should take it into consideration in deciding whether the prosecution have proved their case. In the present case the trial judge directed the jury as follows:—

"Well, members of the Jury, that is the case for the prosecution. Now what is the accused's defence to this charge? You must also consider his evidence, or rather you must consider his defence. The accused, as you know, did not give evidence on oath. He made a statement from the dock and he could not be cross-examined by the prosecution, he could not be questioned by me, he could not be questioned by you. Members of the Jury, you will naturally not be inclined to give so much weight to what he said in the dock as you would if he gave evidence, because when a man gives evidence one can cross-examine on it and test it and generally have a much better opportunity of assessing it. Of course, you must not reject the statement of the accused, you must consider it and give it such weight as you think it is worth having regard to the other evidence that you have."

In our opinion a direction in those terms was perfectly proper and in no way prejudicial to the appellant.

Before dealing with the other grounds urged on behalf of the appellant, it is necessary to set out the material facts briefly. The deceased was a fireman attached to the Bukit Timah fire station. The appellant is a son of another fireman attached to another fire station. Both lived in institutional quarters at the back of the Bukit Timah fire station. On the afternoon of 15th August 1967 the deceased and the appellant took part in a game of football as members of the same team. After the game, another fireman Poosiok bin Dol Raji was sitting near the store room of the Bukit Timah fire station when the appellant joined him and told him of his wanting to see the deceased. After a while, the appellant walked away towards the firemen's quarters. After the appellant had left, Poosiok saw the deceased coming into the station compound through the main gate and walking towards the direction of his own quarters. This was at about 6.25 or 6.30 p.m.

At about 7.25 p.m. the same evening a fire officer, Johan bin Ajmain, while having dinner in his quarters situate on the first floor of the station and just above the station engine room, heard a commotion coming from the direction of the quarters which were in front of his own. He heard shouts by several people and saw the deceased, with his hand on his abdomen, running towards Johan's quarters and being chased by the appellant who was three feet behind the deceased and holding a knife. On seeing this Johan shouted out in Malay, words meaning literally "stop that work". The deceased and the appellant, however, did not stop and Johan then hurried downstairs. He saw blood along the passage which led to the engine room and in the engine room he saw the deceased in the arms of another fireman Johari bin Som. He saw that the deceased had a stab wound in his abdomen. Later on he saw the appellant enter the control room and hand over a knife to a police sergeant.

The control room operator at the time, also saw Johari holding the deceased and saw the appellant with a knife in his hand standing in front of the deceased and Johari. He heard the appellant saying to the deceased words meaning "are you satisfied or not?" After hearing this the control room operator went back to the control room.

Johari testified that at about 7.25 p.m. he was in the engine room and he saw the deceased just inside the engine room bleeding from his abdomen. The deceased asked him to help and he held the deceased on his lap. While the deceased was on his lap, the appellant came in holding a knife in his hand and spoke to the deceased words meaning "are you satisfied or not?"

The deceased's wife said she was called from her quarters and informed of a commotion. She

walked towards the station but at the foot of some steps leading to the station she came across the appellant who told her he had killed her husband and asked for forgiveness.

The knife which the appellant handed to the police sergeant belonged to the appellant's father and was kept in the quarters in which the appellant lived with his father.

The deceased died shortly after admission into hospital and the post mortem revealed a stab wound in his abdomen, one on his right hip and two on his right forearm. The abdominal wound was described by the pathologist as a dual wound with two tracks indicating that the blade of the weapon used was first thrust in, then withdrawn but not completely and then thrust in again but in a different direction. The wound on the deceased indicated that a sharp pointed weapon, such as a knife, was used.

The appellant was examined by a doctor the following day and found to have seven minor scratches on the lower part of his left knee, a minor scratch on his left loin and a minor abrasion at the lower part of his right knee.

In his statement from the dock, the appellant said that during the football game, the deceased called him a bastard because he had missed a kick. After the game he brooded over what he described as insults and belittlements by the deceased during the past few months and after his bath he left his father's quarters and met and told Poosiok he wanted to see the deceased to talk things over. He then saw the deceased enter the main gate and he went towards the deceased who abused him. Later, the deceased waved something in his hand and gestured to him to come down from his father's quarters. He took a knife and went down and met the deceased with the knife in his hand. The deceased tried to grab him, he stepped back, the deceased tried to kick and slap him, he ducked and pulled out the knife from its sheath. The deceased tried to grab the knife, without success, and then ran away. He chased after the deceased who on turning a corner fell on the ground face upwards and he fell on top of the deceased. Both struggled up and the deceased continued running and he just followed. The deceased again fell, got up and ran into the station proper and he followed. In the station he found the deceased lying down being supported by Johari and he just looked on. Then he went away and sat at the bottom of a flight of steps where the deceased's wife found him and he told her he had in a fight accidentally stabbed her husband.

It is urged upon us that as the appellant's statement was the only account of how the deceased came upon the injuries found on him, the appellant's version ought to have been accepted by the jury and he ought to have been acquitted because on that version the deceased's injuries had been accidentally caused in the struggle to get up when they had both fallen on the ground with the appellant on top of the deceased. This submission we reject for the simple reason that there was ample evidence before the jury for them to find, as they must have found by their verdict of guilty of murder, that the injuries were not accidentally caused.

Alternatively, it is urged that the trial judge should have directed the jury that the fatal injury i.e. the abdominal wound, might have been accidentally caused and if they had a doubt on this matter they should give the benefit of the doubt to the appellant. We find no substance in this submission. The jury were adequately directed on the law relating to the defence of accident and were told that they must acquit the appellant if they thought that the injuries on the deceased were accidentally caused. Furthermore, at the close of his summing up the trial judge directed the jury that if they were left in any reasonable doubt as to whether the accused committed the offence of murder as charged, then it was their duty to return a verdict of not guilty. In our opinion the jury was adequately directed on the issue of accident and this ground of appeal therefore fails.

Lastly, it is submitted that on the appellant's statement from the dock, the question of grave and sudden provocation was before the jury and the trial judge had erred first, in withdrawing this issue from the jury, and secondly, in failing to direct the jury adequately on the quantum of proof required when an accused person endeavours to bring himself within one of the exceptions to section 300 of the Penal Code, which would reduce the offence from murder to culpable homicide not amounting to murder.

On the first point, it is said that the trial judge had expressed his own views on whether there was provocation, and if there was, whether the provocation received could be said to be grave and sudden and such as to deprive him of the power of self-control. The views so expressed were said to be all unfavourable to the appellant and therefore amounted to a withdrawal of this issue from the jury. We do not agree. In our opinion a judge is entitled to express his own views provided the jury are told at the same time that they are not bound by those views and are told they are not relieved thereby of the responsibility of arriving at their own conclusions. The summing up was not defective on this point as the judge repeatedly emphasised to the jury that they were not bound to accept his opinion or view on any issue of fact and that it was for them to decide.

On the second point, it is contended that the trial judge misdirected the jury on the quantum of proof required of an accused person who endeavours to bring himself within Exception 1 of section 300 of the Penal Code, the relevant portions of which are as follows:—

"Culpable homicide is not murder if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation."

It is conceded that section 106 of the Evidence Ordinance places the burden or onus on a person accused of an offence under section 300 of the Penal Code to prove the existence of circumstances bringing the case within any special exception of section 300 but it is contended that an accused person discharges that burden or onus if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. The case of *Soh Cheow Hor* v. *R.*[1] is relied on in support of this proposition. In that case Rose C.J. delivering the judgment of the Singapore Court of Criminal Appeal said at page 254:—

"Whatever the position may have been in the past, it appears now to be the accepted rule that when an accused person endeavours to bring himself within one of the exceptions, it is sufficient for his purpose if a reasonable doubt is raised in the minds of the jury as to whether or not the necessary factors exist. If as a result of the evidence of the whole case taken and considered together, the jury find themselves in genuine doubt as to whether or not the case falls within one of the exceptions, then their verdict on the point must be in favour of the accused. . . .".

The trial judge directed the jury as follows:—

"If you think that the accused was gravely and suddenly provoked that he was deprived of his power of self-control, it will be proper for you to convict on culpable homicide not amounting to murder. If on the other hand having weighed all the evidence you are convinced that he is not covered by this exception, then of course it is murder."

It is contended on behalf of the appellant that this direction amounts to a misdirection in that it places too high an onus on an accused person who endeavours to bring himself within Exception 1 of section 300 of the Penal Code. We disagree with the contention. In our opinion the language used sufficiently conveys to the jury that if they are left in genuine doubt as to the existence or non-existence of all the factors relating to the issue of grave and sudden provocation, they must find a verdict of guilty of culpable homicide not amounting to murder.

In any event, assuming there was a misdirection, we are of the opinion that on all the evidence, a reasonable jury properly directed on this point, would be left in no genuine doubt that the provocative conduct and acts of the deceased as related by the appellant in his statement from the dock could not amount to provocation under Exception 1 of section 300 of the Penal Code.

The appeal is accordingly dismissed.

Appeal dismissed.

Solicitors: *David Marshall.*

CHAMPION MOTORS (M) LTD. v. TAN PU TAY

[A.C.J. (Pawan Ahmad J.) November 20, 1968]
[Malacca — Civil Appeal No. 6 of 1966]

Landlord and Tenant — Controlled premises — Landlord requiring premises for own occupation — Who would suffer greater hardship — Notice to quit — Address stated wrongly — Whether invalid — Control of Rent Ordinance, 1956, s. 12(1)(f).

The plaintiffs were the owners of the premises known as 14 and 14-A Pengkalan Rama Road, Malacca. The plaintiffs occupied 14 Pengkalan Rama Road and carried on a business dealing in motor vehicles. The defendant occupied 14-A Pengkalan Rama Road as the plaintiffs' tenant and the premises were rent-controlled.

The plaintiffs demanded of the defendant possession of 14-A Pengkalan Rama Road having given the necessary one year notice to quit on the ground that they required the premises for the purpose of demolishing it and building in its place a new vehicle storage building for increased storage facilities in connection with their motor vehicles business. The notice to quit described the premises in question erroneously as 14 Pengkalan Rama Road instead of 14-A Pengkalan Rama Road.

The learned magistrate who heard the case held that (i) the notice to quit was invalid because it erroneously described the premises and (ii) the plaintiffs had failed to discharge the burden of proving that other accommodation was available for the tenant. The plaintiffs appealed.

Held, dismissing the appeal: (1) as the defendant held only the house under the plaintiffs, he could not have been misled by the mistake in the address given in the notice. The learned magistrate was, therefore, wrong in holding that the notice to quit was invalid. *Re Cox & Ors.*[1] applied;

(2) the onus of proving that alternative accommodation was available for the tenant was upon the landlord and on the evidence adduced at the hearing the plaintiffs had failed to discharge this burden. On the other hand the defendant had discharged the burden that greater hardship would be caused by granting the order than by refusing it.

Perak Hauliers Ltd. v. *The Cycle & Carriage Co. Ltd.*[2] applied.

Cases referred to:—

(1) *Re Cox & Ors.* (1802), 4 Esp. 185; 170 E.R. 685.

(2) *Perak Hauliers Ltd.* v. *The Cycle & Carriage Co. Ltd.* [1962] M.L.J. 7 at p. 9.

CIVIL APPEAL.

D.A. Devadason for the appellants.

Yau Meng Fai for the respondent.

Cur. Adv. Vult.

Pawan Ahmad J.: This is an appeal by the plaintiffs against the decision of the learned magistrate for dismissing with costs their claim for recovery of possession of premises No. 14-A, Pengkalan Rama Road, Malacca, from the defendant.

The plaintiffs are a limited company dealing in the business of motor vehicles at No. 14, Pengkalan Rama Road, Malacca, and they are the landlords of premises No. 14-A, Pengkalan